NO. 83-6195

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ERNEST JOHN DOBBERT, JR.,

Petitioner,

v.

CHARLES D. STRICKLAND, et al.,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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I

WHETHER A TRIAL JUDGE'S OVERRIDE OF A JURY'S VERDICT AGAINST THE DEATH PENALTY VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

II

WHETHER THE FLORIDA STANDARDS GOVERNING THE DECISION TO OVERRIDE A JURY'S LIFE RECOMMENDATION ARE APPLIED IN SUCH A BROAD AND VAGUE MANNER AS TO VIOLATE THE FIFTH, SIXTH, EIGHTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

III

WHETHER THE SYSTEMATIC USE OF PEREMPTORY CHALLENGES TO "EXCLUDE DEATH SCRUPPLED JURORS" VIOLATES THE COURT'S DECISIONS IN ADAMS V. TEXAS, 448 U.S. 38 (1980) AND WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968)?

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Respondents, CHARLES D. STRICKLAND, et al., pray that the petitioner's petition for writ of certiorari be denied.

PREFACE

Respondents accepts petitioner's Citation To Opinions Below, Jurisdiction and Constitutional and Statutory Provisions Involved found on pages 1-2 of petitioner's petition.

In accepting petitioner's jurisdictional statement respondents do not concede any merit to the issues raised

but rather acknowledges the statutory authorization to proceed with the instant petition.

STATEMENT OF THE CASE

The Statement of the Case provided by petitioner is unacceptable.

The facts as set out in Dobbert v. Strickland, 718 F.2d 1518, 1520-1521 (11th Cir. 1983) and in Dobbert v. Florida, 432 U.S. 282, 284-292 (1977) provide a detailed historical review. A summary follows.

The Florida Supreme Court affirmed the conviction and sentence of death of petitioner for the first degree murder of his daughter Kelly Ann Dobbert in Dobbert v. State, 328 So.2d 433 (Fla. 1976). This court granted certiorari review and affirmed the conviction and sentence of death in Dobbert v. Florida, 432 U.S. 282 (1977). Following this court's affirmance, petitioner sought relief pursuant to Gardner v. Florida, 430 U.S. 349 (1977) in the Florida Supreme Court. On March 31, 1978 the Florida Supreme Court vacated petitioner's death sentence and remanded the cause for resentencing. A resentencing hearing was held before the trial court on June 22, 1978 and on June 30, 1978 the trial judge reimposed the death sentence. That sentence was affirmed on July 5, 1979 in Dobbert v. State, 375 So.2d 1069 (1979) cert. den. Dobbert v. Florida, 447 U.S. 912 (1980). Petitioner next joined in a class action suit challenging the propriety of the Florida Supreme Court's review of death cases in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. den. 454 U.S. 1000 (1981).

Petitioner next filed a motion for post-conviction relief in the State trial court in January, 1982. The Florida Supreme Court affirmed the denial of the petitioner's motion for post conviction relief in Dobbert v. State, 409 So.2d 1053 (Fla. 1982). Petitioner then commenced federal review via a petition for writ of habeas corpus in the United States Middle District Court of Florida. Habeas corpus relief was denied in Dobbert v. Strickland, 532 F.Supp. 545 (MD. Fla. 1982). An appeal was taken to the Eleventh Circuit Court of Appeals and the panel opinion on the merits rejected petitioner's claims, affirming the denial of his petition for writ of habeas corpus in Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983) rehearing den. 725 F.2d 1294 (11th Cir. 1983).

Petitioner filed a second petition for writ of habeas corpus October 4, 1982 following his unsuccessfully attempt to obtain relief by way of a petition for writ of error coram nobis or alternatively a petition for writ of habeas corpus in the Florida Supreme Court. The Florida Supreme Court in Dobbert v. State, 414 So.2d 518 (Fla. 1982) rejected petitioner's argument that newly discovered evidence had come to light which would have effected the outcome of his conviction and sentence. On May 6, 1983 District Judge Black granted the State's motion to dismiss petitioner's second petition for writ of habeas corpus, concluding that the second petition raised non-exhausted issue. Petitioner has since filed a second motion for post-conviction relief in the trial court. As of this date no disposition has occurred.

REASONS FOR DENYING THE WRIT

THE TRIAL JUDGE'S OVERRIDE OF THE JURY'S LIFE RECOMMENDATION DOES NOT IMPOSE THE DEATH PENALTY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner argues certiorari review should be granted in light of this Court's acceptance of certiorari review in Spaziano v. Florida, Case No. 83-5596, 52 U.S.L.W. 3509 (January 9, 1984), wherein "the same essential question for review" was raised. Respondents would dispute petitioner's contention that "the same essential question for review" was raised. In Spaziano v. Florida, the petitioner (Issue III) acknowledged that Proffitt v. Wainwright, 428 U.S. 242 (1976); Dobbert v. Florida, 432 U.S. 282 (1977) and Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418 (1983) stand for the proposition that an override of jury recommendation of life is constitutional. Spaziano invited the court to revisit the issue asserting that:

> "Florida's jury override should be declared unconstitutional on its face or at least for a reason: the nature of the death decision, based as it is on retributive impulses, can only be imposed by a cross section of the community whose outrage is being expressed; for this reason, judges have no special expertise and in fact juror's are the true "experts" on whether death is appropriate in any given case; the practice of overturning a juror's penalty determination is contrary to the overwhelming national practice since at least 1948, it is also contrary to the great weight of professional legal opinion."

While this same "generalized legal argument" was presented to the Eleventh Circuit Court of Appeals, in Dobbert v. Strickland, supra, the court concluded:

> "When distilled, Dobbert's argument is both an extension of his position that the non-binding status of the juror's recommendation is unconstitutional per se coupled with an attack on the sufficiency of the evidence under Tedder. As to the former, this feature of the Florida Capital sentencing statute is constitutional. See Proffitt v. Florida, 428 U.S. at 252, 96 S.Ct. at 2966. . . ."
>
> Dobbert v. Strickland, 718 F.2d 1523.

There was a jury override in the instant case. The jury in Dobbert's case as all jury's in Florida death cases gave no specific reason for recommending life. Any assertion drawn therefrom that the jury "verdict" was correct, reasonable and not flawed, is at best, rank speculation. At petitioner's first sentencing proceeding before the jury and the trial judge, Dobbert presented no evidence in mitigation; years later solely before the trial judge, he presented evidence in mitigation which did not establish any mitigating circumstances. On both occasions the trial judge was correct in overriding the jury's recommendation and supported same in its findings of fact in support of the imposition of the death penalty. The trial court and the Florida Supreme Court reviewed all the evidence in mitigation presented to the trial court. Neither the trial court nor the Florida Supreme Court was convinced that said mitigating evidence created either a statutory or non-statutory mitigation circumstance in Dobbert's case. The striking of two aggravating circumstances from four aggravating circumstances found at trial did not create any problems in that the Florida Supreme Court concluded with certainty that the trial court's imposition of death would not have changed absent two of the four aggravating

circumstances. Especially, where no mitigating circumstances were found.

In Florida not only have trial court's overriden jury recommendations of life to death, but jury recommendations of death have been reduced to life imprisonment. As long as the trial court's of Florida comply with the Florida capital sentencing scheme and provide findings of facts to override jury recommendations of life or death, no constitutional infirmity occurs. See Pulley v. Harris, ___U.S.___, 34 Crim. L.R. 3027 (1984).

Petitioner's real argument with regard to his jury override concerns the applicability of this court's decision in Bullington v. Missouri, 451 U.S. 430 (1981). This specific argument was not addressed in Spaziano's petition. Petitioner's reliance on Bullington v. Missouri, supra, as authority that his jury override is constitutionally infirmed based on the Fifth Amendment double jeopardy clause is without merit. The Eleventh Circuit Court of Appeals concluded that Bullington v. Missouri, was inapposite to Florida's death penalty scheme. The court specifically held:

> ". . .in Missouri, the jury sentencing decision is controlling. In that case, the defendant was convicted of capital murder and sentenced by the jury to life imprisonment. After a new trial, the second jury sentenced him to death. The Supreme Court held the Fifth Amendment's double jeopardy clause precluded imposition of a more sever sentence on retrial, analogizing the jury's sentencing function to its role in determining guilt or innocence.
>
> Under the Florida Statute, however, the sentencing jury's verdict is

> merely advisory and not binding on the trial judge. The Supreme Court's approval of Florida's capital sentencing procedure, including the provision for judge sentencing proceeded by a jury recommendation, defuses by implication any charge that the failure of the sentencing judge to follow the jury's recommendation is unconstitutional. (cites omitted) Indeed, as Dobbert concedes, it is an open question where the jury participation in the penalty phase of a capital case is constitutionally required at all. (cites omitted)."
>
> 718 F.2d at 1523. (Emphasis added).

Since the heart of petitioner's argument (a comparison between the Missouri law and Florida's capital penalty scheme) is flawed, respondents would submit certiorari review should be denied. See United States v. DiFransesco, 449 U.S.___, 101 S.Ct. 426 (1980).

II

> THE FLORIDA STANDARD FOR OVERRIDE OF A JURY'S LIFE RECOMMENDATION IS NOT APPLIED IN SUCH A BROAD AND VAGUE MANNER AS TO VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Again citing to Spaziano v. State, supra, petitioner argues that certiorari review should be granted because "even a system that is constitutionally adequate may go awry in a particular case. Godfrey v. Georgia, 446 U.S. 420 (1980)." Specifically citing to the Florida Supreme Court's decision in Tedder v. State, 322 So. 908 (Fla. 1975) petitioner urges a) that the Tedder standard was not applied in his case in a careful or thoughtful manner; b) since the time of petitioner's sentence and appeals the Florida

Supreme Court has acknowledged the infirmanities in the jury override procedure and has toughen and restricted it; and c) that this court's prior observations in Dobbert v. Florida, 432 U.S. at 296 n.9 are dicta and should not be consider as compelling. Petitioner concludes that this court should grant certiorari review to consider this case "together with Spaziano and determine whether the Tedder standard has been to loosely applied here to comport with constitutional requirements."

The affirmities alleged by petitioner have been rejected by each court wherein these assertions have been made. In Dobbert v. Strickland, 718 F.2d at 1523 the Eleventh Circuit concluded:

> ". . .as to the later, we have already held in part 2, supra, that the fact that there was a lack of evidentiary support for two of four aggravating circumstances relied on by the trial court does not render petitioner's sentence constitutionally infirmed. Ford v. Strickland, 696 F.2d at 1259-61. We hold hereafter that mitigating evidence was not unconstitutionally restricted, see part 4 infra. Review of the record under the Tedder standard reveals sufficient support for the ultimate conclusions of the State trial judge's detailed findings, the two opinions of the Florida Supreme Court and the United States Supreme's decision to defeat a constitutional attack on the death penalty as procedurally deficient."

The court in discussing the applicability of Barclay v. Florida, __U.S.___, 103 S.Ct. 3418 (1983) observed:

> ". . .as in Barclay and Ford, the sentencing judge here found no mitigating circumstances and some appropriate statutory aggravating

> circumstances. The judge did not view as aggravating any constitutionally protected conduct. The Florida Supreme Court then followed what seems to be its consistent practice in cases of this kind: to affirm the death sentence if justified under a review of all the evidence and one or more validly found aggravating circumstances are present, even though one or more statutory grounds are not sufficiently shown. Dobbert v. State, 375 So.2d at 1071. As in Barclay, the Florida Supreme Court reviewed the sentence under the heighten standard of Tedder v. State, 322 So.2d 908 (Fla. 1975), because the jury recommended life, concluding "the facts suggesting the death sentence are so clear and convincing that virtually no reasonable person could differ." Dobbert v. State, 375 So.2d at 1071.
>
> Thus, the trial court's imposition of the death sentence and the Florida Supreme Court's affirmance thereof were not arbitrary. The Florida court's satisfied the constitutional requirement by making an "individualized determination on the basis of the character of the individual and the circumstances of the crime. Barclay, ___U.S.___, 103 S.Ct. at 3428 quoting Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235, 251 (1983)(emphasis in original)."
>
> Dobbert v. Strickland, 718 F.2d at 1522.

Lastly as observed in Barclay v. Florida, __U.S.___, 103 S.Ct. at 3428:

> Barclay's brief is interlarded with the retorical references to the 'lawless findings of statutory aggravating circumstances,' brief for petitioner 33, 'protective pronouncement's which. . .seem to determine on and off from case to case about notice of explanation,' Id., at 93, and others in a similar vain. These varied assertions seem to suggest that the Florida Supreme Court failed to properly apply its own cases in upholding petitioner's death sentence. The obvious answer

> the previous discussion, is that mere errors of state law are not the concern of this court, Gryger v. Burke, 334 U.S. 728, 731, 68 S.Ct. 1286, 92 L.Ed. 1683 (1948), unless they rise for some other reason to the level of the denial of rights protected by the United States Constitution.
>
> In any event, we do not accept Barclay's premise. Cases such as Lewis, supra, Williams, supra, and Dobbert, supra indicate that the Florida Supreme Court does not apply its harmless error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is harmless. There is no reason why the Florida Supreme Court cannot examine the balance strick by the trial judge and decide that the elimination of improperly considered aggravating could not possibly effect the balance. (cites omitted). . .
>
> In this case, as in Zant, supra, at ___, 103 S.Ct. at 2749, our decision is buttress by the Florida Supreme Court's practice of reviewing each death sentence to compare it with other Florida capital cases and to determine whether 'the punishment is to great'.(cites omitted) It is further buttress by the rule prohibiting the trial judge from overriding a jury's recommendation of life imprisonment unless 'virtuely no reasonable person could differ'. Tedder v. State, supra, 322 So.2d at 910."

Petitioner's concern that the Florida Supreme Court did not apply "the Tedder test" appropriately is unsupported by the Supreme Court's decisions in this cause. Petitioner has failed to establish the Supreme Court of Florida misapplied Tedder in his case that "virtually no reasonable person could differ."

Certiorari review should be declined.

III

WHETHER THE PROSECUTOR STACKED THE JURY BY THE SYSTEMATIC USE OF PEREMPTORY CHALLENGES TO EXCLUDE DEATH SCRUPPLE JURORS WHO COULD NOT BE EXCLUDED UNDER WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968).

Petitioner's terminally attacks the use of peremptory challenges to reportedly excluded jurors who have death scrupples. The Eleventh Circuit Court of Appeals held that the Florida Supreme Court rejected this issue because of procedural default grounds rather than on the merits of the claims. Petitioner argues that because the Florida Supreme Court's opinion in Dobbert v. State, 409 So.2d 1053 (Fla. 1982) discussed in some length the merits, pursuant to Ulster County Court v. Allen, 442 U.S. 140 (1979) the Eleventh Circuit Court of Appeals erred. In Dobbert v. Strickland, 718 So.2d 1524-1525, the Eleventh Circuit discussed and considered both the procedural default and the merits.

The court found that assuming the procedural default rule applied, Dobbert had failed to satisfy the cause and prejudice requirement exception pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977). The court held cause and prejudice could not be shown for two reasons:

> "First, Witherspoon dealt with the standard for dismissing jurors for cause based on their belief concerning the death penalty and not the systematic exclusion of jurors based on race through peremptory challenges addressed in Swain. Petitioner's now would attack on the State's use of peremptory challenges to exclude death scruppled jurors rest on a synthesis of Witherspoon and Swain, and does not present a true Witherspoon claim so that the weight ability of the pure Witherspoon claim is not properly

> before us. In any event, we have repeatedly held the contemporaneous objection rule constitutional with regard to challenges of the composition of jury panels, Huffman v. Wainwright, 651 F.2d 347, 349 (5th Cir. 1981), and Dobbert has presented no authority with stand for the proposition that Sykes' procedural default rule is in opposite in the Witherspoon content. Second, although the research study in which petitioner's claim is founded was completed after his trial, both Witherspoon and Swain were decided years before. It therefore cannot be said Dobbert lacked the tools to construct the instant constitutional claim at the time of trial. Engle v. Isaac, 456 U.S. 107, 129-34, 102 S.Ct. 1558, 1572-74, 71 L.Ed.2d 783 (1982).
>
> An examination of the merits reveals no constitutional error. We agree with the District Court that Witherspoon and Swain, which address respectively the use of challenges for cause to exclude death scruppled jurors and the use of peremptory challenges to exclude black jurors, have not been extended to instant situations and are inapplicable. Dobbert, Witherspoon/Swain claim is therefore rejected on both procedural and substantive grounds."
>
> 718 F.2d at 1524-1525.

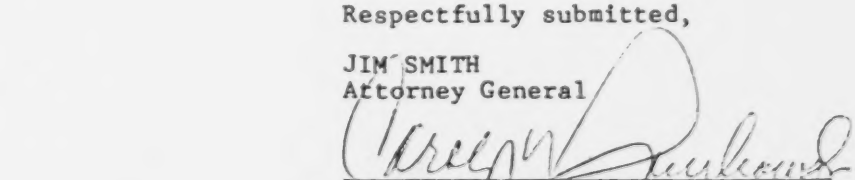
Respondents would submit that petitioner has failed to present either a factual or legal basis upon which further review could be considered.

CONCLUSION

Based on the foregoing, Respondents would urge this court to deny petitioner's petition for writ of certiorari.

Respectfully submitted,

JIM SMITH
Attorney General



CAROLYN M. SNURKOWSKI
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was furnished by mail to PATRICK D. DOHERTY, 619 Turner Street, Clearwater, Florida 33516 and STEVEN L. WINTER, 99 Hudson Street, 16th Floor, New York, New York 10013, Counsel for Petitioner, on this 14 day of March, 1984.

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